In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-5

J. TONY SERRA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of California, petitioner was found guilty of willful failure to file an income tax return for the year 1971, in violation of 26 U.S.C. 7203, and sentenced to four months in prison. He was acquitted of the same charge with respect to the years 1969 and 1970. The court of appeals affirmed by order (Pet. App. 1-2).

During the years at issue, petitioner was a practicing attorney. He is a graduate of Stanford University and the University of California Law School. It was stipulated that petitioner's income for the years at issue was sufficient to require the filing of income tax returns and that petitioner did not file the required returns. Petitioner claimed that his failure to file was not willful because it was prompted by his opposition to the war in Indochina, and not by any bad purpose or evil motive (Pet. 7, 8).

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The district court instructed the jury as follows (Pet. 10-11):

> The only question left for your determination is whether the defendant's failure to timely file returns for each of those years was willful.
>
> The term "willfully," used in the statute, which I have read to you, means that the failure to file an income tax return was voluntary, purposeful, deliberate, and intentional, as distinguished from accidental, inadvertent or negligent.
>
> The failure to file a timely income tax return is willful if the Government proves beyond a reasonable doubt that the defendant's failure to act was with the specific intent to fail to do what he knew the law requires to be done; that is to say, with the conscious purpose of disobeying or disregarding the law which requires the defendant to file a timely return.

Petitioner argues (Pet. 12-13) that the trial court erred by not including in the charge the words "bad purpose" or "evil motive" to explain the willfulness requirement. He urges that the decision below is inconsistent with *United States* v. *Bishop*, 412 U.S. 346, and in conflict with the decisions of several other circuits.[1] But the court of appeals correctly rejected this claim, stating that (Pet. App. 1), "[w]illfulness instructions need not include the term 'bad faith,' 'evil motive,' or 'bad purpose.'" Although the cited cases utilize the phrases "bad purpose" or "evil motive" to define willfulness in a particular case, none of them stands for the proposition that those particular phrases are

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[1]Specifically, *United States* v. *Goldstein*, 502 F.2d 526 (C.A. 3); *United States* v. *Snider*, 502 F.2d 645 (C.A. 4); *United States* v. *Tunnell*, 481 F.2d 149 (C.A. 5); *United States* v. *Bengimina*, 499 F.2d 117 (C.A. 8); and *United States* v. *Pohlman*, 510 F.2d 414 (C.A. 8).

required to be included in every instruction to the jury on willfulness.[2]

Similarly, there is no inconsistency with *Bishop*. There, this Court held that the word "willful" in the criminal tax statutes "connotes a voluntary, intentional violation of a known legal duty" (412 U.S. at 360). The instruction given by the trial court in this case is in complete accord with the *Bishop* definition of "willful." Nothing in *Bishop* requires that the trial court employ any particular words in its instructions to the jury on willfulness. The reference in *Bishop* (412 U.S. at 361) to "the bad purpose or evil motive described in *Murdock*" (*United States* v. *Murdock*, 290 U.S. 389) does not impose such a requirement. While the Court in *Murdock* formulated the requirement of willfulness in terms of "bad faith or evil intent" (290 U.S. at 398), that case does not require that the trial court employ those precise words in its instructions to the jury. As the Court pointed out in *Bishop* (412 U.S. at 360-361), the *Murdock* definition of willfulness is synonymous with the "voluntary, intentional violation of a known legal duty" standard. Both formulations are designed to "separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers" (412 U.S. at 361).

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1975.

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[2]Indeed, *United States* v. *Snider*, *supra*, one of the cases which petitioner asserts conflicts with this decision (Pet. 14-15), specifically disclaimed any intent to decide whether anything more than proof of a voluntary, intentional violation of a known legal duty is necessary to establish the element of willfulness in a tax prosecution (502 F.2d at 657). *United States* v. *Pohlman*, *supra*, also relied upon by petitioner (Pet. 21), is similarly distinguishable. There, the court held that the phrase "without justifiable excuse" should not have been used in the instructions to the jury. At all events, *Pohlman* is not a final decision because the Eighth Circuit granted rehearing *en banc* in that case on April 4, 1975.

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